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IN THE
Supreme Court of the United States

OCTOBER TERM 1978

No. 79-366

ARGENTINE AIRLINES,

Petitioner,

against

PHILIP ROSS, as Industrial Commissioner
of the State of New York,

Respondent.

**BRIEF IN OPPOSITION TO PETITION
FOR CERTIORARI**

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Opinions Below

The Court of Appeals for the State of New York denied petitioner's motion for leave to appeal to that Court. A copy of the Court's order is annexed to the petition for certiorari at Appendix "1a". The opinion of the Supreme Court of the State of New York, Appellate Division, Third Department is reported at 64 A D 2d 994, 408 N.Y.S.2d 831 and appears in the appendix to the petition at "6a". A copy of the decision of the Unemployment Insurance Appeal Board appears in the appendix to the petition at "9a".

Jurisdiction

Petitioner alleges that jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

Question Presented

Where, as here, the Industrial Commissioner in 1974 reversed an erroneous prior determination exempting petitioner from the Unemployment Insurance Law and determined that petitioner was a covered employer liable for contributions retroactive to 1971 and the statute permitted such tax assessments within three years after payment of the wages on which liability was based, is there any constitutional violation warranting exercise of this Court's jurisdiction?

Statement

The petitioner is an airline organized under the laws of Argentina as a decentralized public organization to render service in the field of commercial aviation; it operates as a subdivision of a government ministry. The airline carries passengers and cargo on scheduled flights from Argentina to and from points in the United States, including New York. It employs in excess of 110 employees in New York State, of whom approximately one-half are Argentine nationals on assignment and one-half are United States citizens or residents.

In a determination issued December 30, 1974 the Industrial Commissioner assessed the petitioner the sum of \$14,130 as contributions due for the audit period from January 1, 1971 through December 31, 1971. The assessment was based upon remuneration paid to the employees of Argentine Airlines performing services in New York State. Prior to the determination imposing liability as of

January 1, 1971, the petitioner had been held exempt from the requirements of New York's Unemployment Insurance Law.

Following a hearing on December 18, 1975, a referee of the New York State Department of Labor sustained the assessment determination in a decision dated January 16, 1976 (Petitioner's Appendix 15a). The Unemployment Insurance Appeal Board modified and affirmed the decision of the Referee and sustained the Industrial Commissioner's determination in a decision dated January 25, 1977 (Petitioner's Appendix 9a).

On appeal to the Appellate Division of the State Supreme Court, that Court unanimously affirmed the Board's decision. *Argentine Airlines v. Ross*, 64 A D 2d 994, 408 N.Y.S.2d 831 (3d Dept. 1978) (Petitioner's Appendix 4a). Denial of petitioner's motion for leave to appeal to the Court of Appeals was ordered by the Appellate Division on March 8, 1979 and by the Court of Appeals on June 5, 1979 (Petitioner's Appendix 1a, 2a).

ARGUMENT

Petitioner has presented no valid reasons for this Court to exercise its discretion in granting certiorari.

Petitioner asks that this Court grant certiorari to review the retroactive assessment by the Industrial Commissioner of unemployment insurance taxes against it, although the assessment is specifically provided for by statute. New York Labor Law § 576(1) states that:

Determinations of liability for contributions. No determination of liability for contributions pursuant to section five hundred sixty of this article shall be made *more than three years after the last day of the calendar year in which the wages on which such liability is based were paid.* (emphasis added).

The determination at issue was validly issued in 1974 for the calendar year 1971.

Moreover, it is well established that the Commissioner may change an interpretation of a statute which was clear error, even when this results in a distinct reversal of a previous position and the taxpayer had relied upon the previous position. *Dixon v. United States*, 381 U.S. 68 (1965); *Calbeck v. Travelers Insurance Company*, 370 U.S. 114, 127 fn. 15 (1962); *Automobile Club of Michigan v. Commissioner*, 353 U.S. 180 (1957); *Irish International Airlines v. Levine*, 41 NY2d 819, *affg.* 48 A D 2d 202 (3d Dept. 1975). See *Barrett v. United States*, 423 U.S. 212, 222 fn. 6 (1979); *Fribourg Navigation Co. v. C.I.R.*, 383 U.S. 272, 297 (dissenting opinion) (1977).

In this case the Commissioner, validly exercising his administrative powers,* reversed his position exempting Argentine Airlines from the operation of the Unemployment Insurance Law because it is a foreign government. The reversal followed a similar reversal involving Irish International Airlines, which determination was ultimately ruled on by the Court of Appeals, unanimously affirming and adopting the opinion of the Appellate Division. As that Court stated:

"The facts, circumstances and law pertaining to the controversy were the same in 1965 as they were in 1971 when respondent reversed the prior determination. Initially the Industrial Commissioner concluded appellant was wholly owned by the government of Ireland and therefore exempt from the Unemployment Insurance Law (Labor Law, art. 18). Subsequently, however, in interpreting the same statute, the commis-

* The New York State Unemployment Insurance Law extends no express exemption from taxation to a foreign government or its operations. *Argentine Airlines v. Ross*, 64 A D 2d 994, 408 N.Y.S.2d 831.

sioner concluded that an airline was a civil instrumentality and not governmental and therefore, appellant did not come within the exemption. We agree with respondent's contention that *the 1965 determination was erroneous as a matter of law and respondent had the obligation to correct it.* To hold that there was no such obligation would result in exempting appellant from the tax, while at the same time obligating others similarly situated to contribute." *Irish International Airlines v. Levine*, 48 AD2d 202, 203 *affd* 41 NY2d 819 for reasons stated in the Appellate Division opinion (emphasis added).

The Commissioner in the instant case was merely being consistent and acting in accordance with New York law in holding a foreign airline to be liable for contributions under the Unemployment Insurance Law.

Petitioner's assertion that *Central Illinois Public Service Co. v. United States*, 435 U.S. 21 (1978) ("*Central Illinois*"), is controlling in this case misstates that ruling. *Central Illinois*, ruling that lunch reimbursement of employees by the employer did not qualify as "wages" within the withholding provisions of the Internal Revenue Code, is neither controlling nor relevant to the assessment issued by the Industrial Commissioner. The proposed retroactive application of that ruling was disturbing to the concurring justices, but even they did not opine that a taxing authority could not tax retroactively. Indeed, they cited with approval both *Dixon v. United States*, *supra* and *Automobile Club of Michigan v. Commissioner of Internal Revenue*, *supra*, for the proposition that the Commissioner is authorized to correct "mistakes of law". Moreover, the conditions present there which concerned the concurring justices are not present in this case. *E.g.*, here there is statutory authority to impose retroactive liability for up to three years, a period which was not exceeded. New York Labor Law § 576(1). Furthermore,

the assessment here involves an employer's responsibility for its own tax liability, not that of its employees, as in *Central Illinois*. The imposition of the tax in this case *does* serve the function of ensuring that similarly situated entities (i.e. commercial airlines) are assessed equally. Finally, there is not present here the peculiar legislative history concerning withholding taxes and the particular facts and interpretations related thereto which played such a large part in the justices' conclusions.

The decision of the New York courts in this case not only fails to raise any question of law of sufficient importance to warrant review by the Court, but is in complete harmony with this Court's decisions.

CONCLUSION

For the reasons set forth above this Court should not exercise certiorari jurisdiction here.

Dated: New York, New York
November 2, 1979

Respectfully submitted,

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